CHIEW YIT KIN v. PENGARAH TANAH DAN GALIAN WILAYAH PERSEKUTUAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[WRIT SUMMONS NO: WA-21NCVC-58-04-2022]
30 MARCH 2023

Abstract – *(i) The law is clear that there will be a breach of para. 8(9) of the Fourteenth Schedule of the National Land Code by the Registrar if he issues a computerised issue title of document ('IDT') to a third party while the existing IDT for the said land is still in possession of the land owner. A change of name of the registered owner of the land ought not to happen without the submission of a genuine IDT. In such circumstances, the land office is liable to the landowner for negligence in failing to exercise reasonable care in registering the transfer of the title to the land from the landowner to another party; (ii) A purchaser is not in law considered a subsequent purchaser under the proviso to s. 340(3) of the National Land Code if he has acquired his title not from an immediate purchaser but from imposters of those entitled to the land. As an immediate purchaser, and not a subsequent purchaser, he is therefore not entitled to indefeasibility of title as against the landowner under s. 340(3).*

LAND LAW: *Fraud – Transfer – Fraudulent transfer of land through forged documents – Forgery – Claim for negligence – Whether plaintiff had locus standi – Whether title to land found to have been fraudulently transferred – Registrar issued computerised issue document of title ('IDT') to third party while existing IDT for land still in possession of landowner – Whether there was statutory breach of para. 8(9) of Fourteenth Schedule of National Land Code – Adverse inference under s. 114(g) of Evidence Act 1950 – Whether ought to be invoked – Whether land office liable for negligence in failing to exercise reasonable care in registering transfer of title from plaintiff to another party – Whether Government of Malaysia vicariously liable*

LAND LAW: *Title – Indefeasibility – Fraudulent transfer of lands – Forgery – Whether purchasers acquired land from party who obtained title fraudulently – Whether immediate purchasers and not subsequent purchasers – Whether purchasers of land could invoke protection of bona fide buyer in good faith – Whether entitled to indefeasibility of title under s. 340(3) of National Land Code*

This was a land fraud case. The plaintiff alleged that her vacant land in Damansara Heights ('subject land') was transferred to the third defendant and then to the seventh and eighth defendants through land fraud. The plaintiff filed a writ and amended statement of claim (encl. 18) against the (i) first

defendant/land office for negligence; (ii) the second defendant/Government of Malaysia for vicarious liability; (iii) the third defendant who was the first transferee of the subject land and the fourth to fifth defendants who were directors of the third defendant for fraud; (iv) the sixth defendant/lawyer who falsely and purportedly attested the plaintiff's execution of the transfer Form 14A in favour of the third defendant; (v) the seventh to eighth defendants/buyers of the subject land for fraud and forgery and obtaining title through a void instrument; and (vi) the ninth defendant who had entered a lien holders caveat on the subject land. The plaintiff was the sole proprietor of the subject land and the original issue document of title ('IDT') for the subject land ('genuine IDT') had always been and remained with the plaintiff. At all material times, the plaintiff had never surrendered and/or parted with and/or disposed of the genuine IDT in any manner whatsoever to any third party whosoever. The plaintiff was informed by certain parties that the subject land was sold and/or transferred to a new owner. A land search on the subject land and further investigation by the plaintiff revealed that the third defendant entered a private caveat on the subject land through a Form 19B executed by the fourth and fifth defendants, purportedly on the reason that the third defendant had made a part payment of the purchase price to purchase the subject land from the plaintiff as the seller. The plaintiff had purportedly transferred the subject land to the third defendant, and the title purportedly registered in the third defendant's name ('fraudulent transfer'). The plaintiff had purportedly executed a Form 14A as an instrument for transfer of the subject land in consideration for RM4,300,000 ('fraudulent Form 14A') by purportedly signing on it ('forged signature'). The sixth defendant had purportedly witnessed and attested the plaintiff's consent and the forged signature on the fraudulent Form 14A. The fourth and fifth defendants had executed the fraudulent Form 14A as directors of the third defendant to purportedly receive the transfer of the subject land in the third defendant's name. The first defendant registered the title of the subject land in the third defendant's name upon the presentation of the fraudulent Form 14A by the latter. Thereafter, the fourth and fifth defendants executed the Form 14A as an instrument for transfer of the subject land to the seventh and eighth defendants as joint purchasers. About 74 days after the fraudulent transfer, the third defendant transferred the subject land to the seventh and eighth defendants as joint purchasers. The ninth defendant subsequently entered a lien-holder's caveat on the subject land. After the transfer of the subject land to the seventh and eighth defendants, the fourth and fifth defendants resigned from the third defendant. The third defendant was subsequently dissolved and its name struck off from the Register of Companies. The title of the subject land remained in the seventh and eighth defendants' names. At all material times, the plaintiff had never consented to the fraudulent transfer to the third defendant or any other party. Nor had she ever received any consideration from the third defendant for the

fraudulent transfer. The plaintiff further contended that the third defendant, as a RM2 shell company with zero current assets and negative cash balance, simply had no means to pay any consideration to purchase the subject land from the plaintiff. The plaintiff had never executed the fraudulent Form 14A. She had never signed the forged signature on the fraudulent Form 14A which was purportedly witnessed and attested by the sixth defendant. Upon discovery of the fraudulent transfer, she lodged a police report with the Royal Malaysian Police. The issues that were to be determined by this court were (i) whether the title to the subject land was fraudulently transferred from the plaintiff to the third defendant without the plaintiff's knowledge and consent, through the acts of fraud and forgery by the third, fourth, fifth and sixth defendants; (ii) whether the first and second defendants were liable to the plaintiff for negligence in failing to exercise reasonable care in registering the transfer of the title to the subject land from the plaintiff to the third defendant; (iii) whether the seventh and eighth defendants were entitled to register and retain the title to the subject land in their personal names as *bona fide* subsequent purchasers of the subject land in good faith and for valuable consideration, if any; (iv) whether the seventh and eighth defendants were immediate purchasers and not subsequent purchasers under the proviso to s. 340(3) of the National Land Code ('NLC') as they had acquired their title not from an immediate purchaser but from imposters of those entitled to the land; and (v) whether the plaintiff had absolutely assigned her right over the subject land to her daughter as a donee under a power of attorney and hence had no *locus standi* to file this suit.

Held (allowing prayers 5.81 to 5.86 of amended statement of claim; allowing order for damages to be assessed against first and second defendants):

(1) Under Malaysian law, a landowner does not lose the right to his or her land merely by virtue of creating a power of attorney in favour of a donee or attorney. The donee of the power of attorney is merely to act as agent for the principal and there is nothing to prevent the principal dealing with the property notwithstanding it. The preamble to the power of attorney herein clearly stated that the plaintiff was desirous of recovering the subject land with the assistance of her daughter as her attorney. Nowhere did the terms of the power of attorney say that the plaintiff had absolutely assigned her right over the subject land to her daughter. Therefore, the plaintiff had *locus standi* and was competent to file this suit to recover her land. (paras 70-75)

(2) The plaintiff asserted that she did not execute the Form 14A for the fraudulent transfer. The plaintiff also testified that she did not sign the application to change the name registered on the title to the subject land and the related statutory declaration in support of the said application. The plaintiff's handwriting expert, PW1, also testified in his conclusion

'that there is a very high probability that the writer of the specimen signatures, the plaintiff, is not the author of the disputed signatures.' The first, second, seventh, eighth and ninth defendants also did not file any written submissions to oppose the plaintiff's contention on this issue. The failure to rebut the submissions of the plaintiff gave rise to the irresistible conclusion that they did not contest the fact that the title to the subject land was fraudulently transferred from the plaintiff to the third defendant, without the plaintiff's knowledge and consent, through the acts of fraud and forgery by the third, fourth, fifth and/or sixth defendants. When a defendant fails to defend the claim of fraud, it should be assumed that the plaintiff had made out fraud against the said defendant. The title to the subject land was fraudulently transferred from the plaintiff to the third defendant without the plaintiff's knowledge and consent, through the acts of fraud and forgery by the third, fourth, fifth and/or sixth defendants. (paras 79-87)

(3) The law is clear that there will be a breach of para. 8(9) of the Fourteenth Schedule of the NLC by the Registrar if he issues the computerised IDT to a third party while the existing IDT for the said land is still in the possession of the landowner. This breach is a breach of his statutory duty under the NLC as well as a breach of his duty of care to the landowner. It was undisputed that the plaintiff still has the genuine IDT with her. The first defendant's sole witness DW4 could not explain how and why the land office had issued the computerised IDT for the subject land when the genuine IDT was still with the plaintiff. DW4 could not explain why the first defendant allowed a change of name of the registered owner of the subject land from Chin Yu Tow nee Chiew Yit Kin to Chiew Yit Kin/the plaintiff without the submission of the genuine IDT. DW4 also could not explain why the first defendant failed to notify the plaintiff by way of Form 19A as required under s. 324(3) of the NLC when the third defendant lodged a caveat on the subject land. DW4 further could not explain how the fraudulent transfer could have happened when the presentation was not accompanied by the genuine IDT. The facts showed that the plaintiff had proved her case on a balance of probability that the land office had issued the computerised IDT for the subject land when the genuine IDT was still with the plaintiff, which was a breach of para. 8(9) of the Fourteenth Schedule of the NLC by the Registrar. Therefore, the first defendant was liable to the plaintiff for negligence in failing to exercise reasonable care in registering the transfer of the title to the subject land from the plaintiff to the third defendant. The second defendant was also held to be vicariously liable for the said negligence of the first defendant. (paras 94-107)

(4) DW4 had no actual knowledge of the transactions in question and candidly admitted that the officers who had actual knowledge were one Zaini who handled the application to change the name and one Nor Laili who handled the application to lodge a caveat by the third defendant and who allowed the fraudulent transfer. An adverse inference under s. 114(g) of the Evidence Act 1950 ought to be drawn by this court against the first defendant for not calling Zaini and Nor Laili as witnesses. There was no reasonable explanation for the failure to produce these two material witnesses. The adverse inference would be that if they were to testify, their evidence would affect the first defendant adversely. (paras 102 & 104)

(5) A purchaser is not in law considered a subsequent purchaser under the proviso to s. 340(3) of the NLC if he has acquired his title not from an immediate purchaser but from imposters of those entitled to the land. Similarly, in this case, the seventh and eighth defendants did not acquire the subject land from a purchaser who bought from a fraudster seller. Instead, the seventh and eighth defendants bought the subject land from the third defendant who had obtained the title fraudulently by executing a fraudulent Form 14A which contained the plaintiff's forged signature. Therefore, the seventh and eighth defendants were immediate purchasers and not subsequent purchasers. They were therefore not entitled to indefeasibility of title as against the plaintiff under the proviso to s. 340(3) of the NLC. On this ground alone, the plaintiff was entitled to judgment against the seventh and eighth defendants. (paras 115-118)

(6) The seventh and eighth defendants never produced in court the private land search purportedly conducted on the subject land before entering into the sales and purchase agreement. Their witness statements merely made the averment without producing the private land search. The seventh and eighth defendants had not proven their assertion that the purchase of the subject land was made in good faith based on the result of a private land search conducted. Further, the purported 44.4% of the purported purchase price paid by the seventh and eighth defendants before the seller/third defendant agreed to the terms of the SPA and signed the SPA showed that they had failed to discharge their evidential burden to prove their assertion that the purchase of the subject land was made in good faith. Further, the seventh defendant had testified that he had taken the risk to pay RM2 million in cash even before signing the SPA and even before searches were done and that if anything went wrong, he would accept responsibility. Therefore, the seventh and eighth defendants could not now invoke the protection of *bona fide* buyer 'in good faith' as required by the proviso to s. 340(3) of the NLC. (paras 126-139)

(7) The assessment notices did not show that the third defendant was the owner of the subject land. The solicitor for the seventh and eighth defendants would have seen these bills and notices as part of her due diligence checks before she did the transfer of the subject land from the third defendant to the seventh and eighth defendants. She would have seen the owner stated on all these bills and notices was not the third defendant. This was a big red flag. Her failure to do such checks amounted to a lack of good faith as required under the proviso to s. 340(3) of the NLC. The solicitor's failure was imputed to the seventh and eighth defendants. Therefore, the seventh and eighth defendants had failed in their evidential burden to prove that they had purchased in good faith as required under the proviso to s. 340(3) of the NLC. (paras 140-144)

(8) However, there was really no hard evidence before this court to make the inference that the seventh and eighth defendants were privy to the fraud and forgery perpetrated by the third defendant to sixth defendants against the plaintiff. The plaintiff had failed to prove this on a balance of probability. The seventh and eighth defendants may have taken advantage of the opportunity to buy the subject land at a low price but that did not make them privy to the fraud and forgery perpetrated by the third defendant to sixth defendants against the plaintiff. As for the ninth defendant, it had not shown that it was entitled to lodge a lien-holder's caveat on the subject land as against the plaintiff as the plaintiff was the rightful owner of the subject land. The plaintiff was therefore entitled to an order to remove the ninth defendant's lien-holder's caveat on the subject land. (paras 161-165)

Case(s) referred to:

Abu Bakar Ismail & Anor v. Ismail Husin & Ors And Other Appeals [2007] 3 CLJ 97 CA ***(refd)***

Appraisal Property Management Sdn Bhd & Ors v. Singham Sulaiman Sdn Bhd [2023] 2 CLJ 206 CA ***(refd)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors [2015] 9 CLJ 422 CA ***(refd)***

CIMB Bank Bhd v. AmBank (M) Bhd & Ors [2017] 9 CLJ 145 FC ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Marappan Muthusamy v. R Sivam Ramasamy [2013] 1 LNS 1381 CA ***(refd)***

Mok Sai How v. Dakang Bikasan [2019] 1 LNS 2295 HC ***(refd)***

Muniandy Nadasan & Ors v. Dato' Prem Krishna Sahgal & Ors (Dato' Jeyaraj V Ratnaswamy, Intervener) [2017] MLJU 2047 ***(refd)***

Pendaftar Hakmilik Negeri Selangor v. Caesius Development Sdn Bhd & Ors And Another Appeal [2020] 3 CLJ 327 CA ***(refd)***

Premier Consortium Sdn Bhd v. Ho May Leng & Ors [2015] 1 LNS 1243 HC ***(refd)***

Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441 FC ***(refd)***

Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2015] 1 LNS 529 HC ***(refd)***

S Selvam Samikannu v. Messrs Krish & Kiew, A Firm [2016] 1 LNS 1777 HC ***(refd)***
Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir' [2012] 1 LNS 116 HC ***(refd)***
Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2013] 1 CLJ 153 HC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
T Sivam Tharamalingam v. Public Bank Bhd [2018] 6 CLJ 1 FC ***(refd)***
Tai Swee Kian v. Tay Boo Thiah & Ors [2011] 1 LNS 1422 HC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Wee Tiang Peck v. Teoh Poh Tin [1994] 1 LNS 154 HC ***(refd)***
Wong Ing Tong v. Yap Piat Eng & Anor And Other Appeals [2022] 4 CLJ 882 CA ***(refd)***
Yap Piat Eng & Anor v. Yap Kok Sheng & Ors [2020] 1 LNS 618 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
National Land Code, ss. 324(3), 340(3), Fourteenth Schedule, para 9(9)(d)
Public Authorities Protection Act 1948, s. 2

For the plaintiff - Wong Rhen Yen, Marcus Lee Min Lun, H'ng Yen Jun & Low Han Shin; M/s Dennis Nik & Wong
For the 1st & 2nd defendants - Natassa Zaini & Norazlin Mohamad
For the 7th, 8th & 9th defendants - S Saravanan, Ramesh Lachman & Fairuz; M/s Saravanan & Nasriq

Reported by Suhainah Wahiduddin

JUDGMENT

Leong Wai Hong JC:

Introduction

[1] This is another land fraud case.

[2] The typical *modus operandi* from the Latin *modus operandi* (literally "manner or method of working") of the fraudsters involves the following components:

(i) a vacant land. This is because if the land or house is occupied it will be difficult for the fraudster to pretend to be the owner as the buyer will view the property prior to purchase.

(ii) a computerised issue document of title ("IDT") obtained from the land office either through a false statutory declaration that the existing IDT is lost or stolen, or obtained through an insider working at the land office.

(iii) a sale price that is below the market value taking advantage of human greed.

(iv) a fraudster seller who insists on receiving the deposit and/or balance sale price in cash.

A (v) a fraudster seller who requests the deposit and/or balance sale price to be paid to a third party and not to him.

(vi) a fraudster seller who uses a fake NRIC with the real owner's name and identity card number.

B See:

(i) *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2015] 1 LNS 529; [2015] MLJU 148 HC Lim Chong Fong J.

(ii) *Premier Consortium Sdn Bhd v. Ho May Leng & Ors* [2015] 1 LNS 1243 HC Hadhariah Syed Ismail J.

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(iii) *S Selvam Samikannu v. Messrs Krish & Kiew, A Firm* [2016] 1 LNS 1777; [2016] MLJU 948 HC Rozana Ali Yusoff JC.

(iv) *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441; [2019] 2 MLRA 591 FC.

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(v) *Yap Piat Eng & Anor v. Yap Kok Sheng & Ors* [2020] 1 LNS 618; [2020] MLJU 572 HC Darryl Goon Siew Chye J.

(vi) *Wong Ing Tong v. Yap Piat Eng & Anor And Other Appeals* [2022] 4 CLJ 882; [2023] 2 MLJ 1 CA Hadhariah Syed Ismail JCA.

E **[3]** Unless solicitors and the land office are alert as to the *modus operandi* of these fraudsters, land fraud cases will continue to occur. Owners of vacant land will continue to fear their lands sold without their knowledge and consent. Buyers will fear they are paying good money only to see their ownerships set aside with no hope of recovering their outlays.

F **[4]** The plaintiff in this judgment alleges that her vacant land in Damansara Heights ("subject land") was transferred to the third defendant and then to the seventh and eighth defendants through a land fraud.

[5] The plaintiff filed a writ and amended statement of claim (encl. 18) G against:

(i) the first defendant/land office for negligence;

(ii) the second defendant/Government of Malaysia for vicarious liability;

(iii) the third defendant who is the first transferee of the subject land and the H fourth to fifth defendants who are directors of the third defendant for fraud.

(iv) the sixth defendant/lawyer who falsely and purportedly attested the plaintiff's execution of the transfer Form 14A in favour of the third defendant.

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(v) the seventh and eighth defendants/buyers of the subject land for fraud and forgery and obtaining title through a void instrument; and

(vi) the ninth defendant who had entered a lien-holders caveat on the subject land.

[6] In this judgment, parties will be referred to as first defendant or D1, second defendant or D2 *etc*.

[7] The first and second defendants deny there was negligence on the part of D1.

[8] The third to sixth defendants did not enter appearances. The plaintiff has obtained judgments in default of defence against them on 19 September 2022 with the consent of the first, second, seventh to ninth defendants without prejudice to the rights of the seventh to ninth defendants. See encl. 54.

[9] The seventh and eighth defendants contend that they have indefeasibility title as they are *bona fide* purchasers in good faith and for valuable consideration. They invoked the protection under the proviso to s. 340(3) of the National Land Code ("NLC").

Court Pleadings

The Pleaded Case Of The Plaintiff

[10] The pleaded case of the plaintiff in her amended statement of claim is as follows.

The Subject Land

[11] The plaintiff is the sole proprietor of the subject land bearing the title number Hakmilik HS(D) 31896 PT 669 Mukim Kuala Lumpur since 6 January 1983. The subject land is 1053.765 square metres and is in Damansara Heights, Kuala Lumpur.

[12] The original IDT for the subject land ("genuine IDT") has always been and remains with the plaintiff.

[13] At all material times, the plaintiff has never surrendered and/or parted with and/or disposed of the genuine IDT in any manner whatsoever to any third party whosoever.

Fraudulent Transfer Of The Subject Land

[14] On or about 1 October 2021, the plaintiff's gardener was informed by the resident(s) who were living in the neighbouring house(s), that the subject land was sold and/or transferred to a new owner. He then informed the plaintiff.

[15] A land search on the subject land and further investigation by the plaintiff revealed the following events:

A (i) the third defendant entered a private caveat on the subject land through a Form 19B executed by the fourth and fifth defendants on 9 February 2015, purportedly on the reason that the third defendant had made a part payment of the purchase price to purchase the subject land from the plaintiff as the seller.

B (ii) the plaintiff had purportedly transferred the subject land to the third defendant, and the title purportedly registered in the third defendant's name on 13 July 2015. ("fraudulent transfer").

(iii) the plaintiff had purportedly executed a Form 14A as an instrument for C transfer of the subject land in consideration for RM4,300,000 ("fraudulent Form 14A") on 3 March 2015 by purportedly signing on it. ("forged signature").

(iv) the sixth defendant had purportedly witnessed and attested the plaintiff's consent and the forged signature on the fraudulent Form 14A on 3 D March 2015.

(v) the fourth and fifth defendants had executed the fraudulent Form 14A as directors of the third defendant to purportedly receive the transfer of the subject land in the third defendant's name.

E (vi) the first defendant registered the title of the subject land in the third defendant's name upon the presentation of the fraudulent Form 14A by the latter.

Events After The Fraudulent Transfer

[16] The fourth and fifth defendants executed the Form 14A as an F instrument for transfer of the subject land to the seventh and eighth defendants as joint purchasers in consideration for RM4,500,000 on 1 September 2015.

[17] About 74 days after the fraudulent transfer, on 25 September 2015, the third defendant transferred the subject land to the seventh and eighth G defendants as joint purchasers.

[18] The ninth defendant entered a lien-holder's caveat on the subject land on 20 May 2016.

[19] After the transfer of the subject land to D7 and D8, the fourth and fifth H defendants resigned from the third defendant. The third defendant was subsequently dissolved and its name struck off from the Register of Companies.

[20] The title of the subject land remains in the seventh and eighth defendants' names.

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The Plaintiff Is The Innocent Victim

[21] At all material times, the plaintiff has never consented to the fraudulent transfer to the third defendant or any other party. Nor has she ever received any consideration from the third defendant for the fraudulent transfer.

[22] The plaintiff further contends that the third defendant, as a RM2 shell company with zero current assets and negative cash balance, simply has no means to pay any consideration to purchase the subject land from the plaintiff.

[23] The plaintiff has never executed the fraudulent Form 14A. She has never signed the forged signature on the fraudulent Form 14A which was purportedly witnessed and attested by the sixth defendant.

[24] Upon discovery of the fraudulent transfer she lodged a police report on 8 October 2021 with the Royal Malaysian Police.

Particulars Of Fraud And/Or Forgery Of The Third, Fourth And/Or Fifth Defendants

[25] The third, fourth and/or fifth defendants had fraudulently obtained the subject land by perpetrating or caused to be perpetrated the fraudulent transfer.

[26] The third, fourth and/or fifth defendants forged or caused to be forged the forged signature on the fraudulent Form 14A which does not belong to the plaintiff.

[27] The plaintiff contends that the third, fourth, and fifth defendants have acted in concert and/or with the common intention to perpetrate the fraudulent transfer. As a result of the fraudulent transfer, the plaintiff suffered loss and damage, including the loss of her proprietorship as a legal and beneficial owner over the subject land.

Particulars Of Fraud And/Or Forgery Of The Sixth Defendant

[28] The sixth defendant has made and/or caused to be made a false declaration and/or fraudulent representation to the first defendant that she has witnessed and attested the plaintiff's execution of the fraudulent Form 14A by inscribing a hand-written signature on it.

[29] The plaintiff contends that the sixth defendant has acted in concert and/or with the common intention together with the third, fourth and fifth defendants to perpetrate the fraudulent transfer.

Particulars Of Negligence Of The First And Second Defendants

[30] The first defendant owes the plaintiff a duty to exercise reasonable care by making necessary enquiries and/or conducting a fair assessment on the presentation of the instrument for a transfer of the subject land before effecting the fraudulent transfer.

[31] The first defendant had failed to exercise reasonable care by negligently endorsing its memorial on the documents of title to the subject land when the presentation of the fraudulent Form 14A was unaccompanied by the genuine IDT. At all material times, the genuine IDT was and has always been in the custody of the plaintiff.

[32] As a result of the first defendant's gross negligence, the plaintiff suffered loss and damage, including loss of her proprietorship as a legal and beneficial owner over the subject land.

[33] The plaintiff further contends that the second defendant is vicariously liable for the negligence of the first defendant.

The Title In The Seventh And Eighth Defendants' Names Is Defeasible In Law

[34] The plaintiff contends that the title obtained by and now registered in the seventh and eighth defendants' names as immediate purchasers is defeasible in law.

[35] Further, the plaintiff contends that the seventh and eighth defendants are not *bona fide* purchasers in good faith and for valuable consideration.

[36] The plaintiff prays for the following reliefs:

(i) a declaration that the plaintiff is the registered proprietor and the true legal and beneficial owner of the subject land;

(ii) a declaration that all and any of the register and issue documents of title to the subject land, endorsed and/or issued by the first defendant after the date of the genuine IDT, are not the true indicia of title to the subject land and are therefore null and void;

(iii) an order for all and any of the IDT to the subject land, endorsed and/or issued by the first defendant after the date of the genuine IDT, be produced and delivered by the third, fourth, fifth, seventh, eighth and/or ninth defendants to the first defendant to be cancelled and extinguished immediately;

(iv) an order for all the memorials endorsed by the first defendant which are appearing in the register document of title to the subject land relating to the interests of the third, fourth, fifth, seventh, eighth, and ninth defendants be cancelled and extinguished immediately by the first defendant;

(v) an order for the removal of the lien-holder's caveat entered into by the ninth defendant on 20 May 2016;

(vi) an order for all the lawful documents of title and records of the first defendant be rectified to reinstate the genuine IDT and the plaintiff as the registered proprietor of the subject land with immediate effect;

(vii) an order for damages to be assessed, against the first to sixth defendants;

(viii) an order for exemplary damages to be assessed, against the first to sixth defendants;

(ix) costs on indemnity basis; and

(x) such further and other relief that this Honourable Court deems fit in the circumstances.

The Pleaded Defence Of The First And Second Defendants

[37] The first and second defendants contend that they were not negligent in registering the transfer of the title to the subject land from the plaintiff to the third defendant on 13 July 2015.

[38] It is the first and second defendants' case that the registration of the fraudulent transfer was done in good faith based on the documents and instruments presented to them in accordance with the requirements of the NLC.

[39] Further, they contend that they have no knowledge of the alleged fraud.

[40] In their defence, D1 and D2 also pleaded that the suit is time-barred under s. 2 of the Public Authorities Protection Act 1948. This defence of time bar has now been dropped as told by counsel for D1 and D2 to this court at the oral submissions on 8 March 2023.

The Pleaded Defence Of The Seventh To Ninth Defendants

[41] The seventh to ninth defendants deny they were involved in any fraud or had any knowledge of any fraud. They also plead that the seventh and eighth defendants are *bona fide* purchasers for valuable consideration under the proviso to s. 340(3) of the NLC and have indefeasibility title in the subject land.

The Trial Process

[42] The trial took three days on 23 November 2022, 24 November 2022 and 2 December 2022.

[43] The plaintiff called three witnesses. They are:

(i) Mr Lim Yok Chaw (PW1) who is a qualified document examiner. His witness statement is marked as WSPW1.

(ii) Mr Lee Kien Fatt (PW2) who is a part-time gardener for the plaintiff. His witness statement is marked as WSPW2.

(iii) the plaintiff herself (PW3). Her witness statement is marked as WSPW3.

[44] The first and second defendants called one witness. He is Encik Khairul Azam bin Saroni (DW4) who is a Ketua Penolong Pengarah, Bahagian Pendaftaran of the first defendant. His witness statement is marked as WSDW4.

[45] The seventh and eighth defendants testified in their defence as DW3 and DW2 respectively. The eighth defendant's witness statement is marked as WSDW2. The seventh defendant's witness statement is marked as WSDW3.

[46] The seventh and eighth defendants also called Sigathambal a/p Periathamby (DW1) as their witness. She was the seventh and eighth defendants' solicitor who handled the sale and purchase agreement dated 1 September 2015 between the third defendant and the seventh and eighth defendants. Sigathambal a/p Periathamby (DW1) testified as a subpoenaed witness and didn't prepare a witness statement.

[47] Parties concurrently filed their written closing submissions. The plaintiff and the seventh, eighth and ninth defendants filed their written submissions in reply except for the first and second defendants who chose not to file a reply submission despite invitation from this court.

[48] Oral submissions by counsel were held before me on 14 February 2023 and on 8 March 2023. Decision was reserved.

The Issues To Be Tried Agreed By The Parties

[49] The issues to be tried agreed by the parties dated 17 August 2022 to be determined by this court are:

(i) whether the title to the subject land was fraudulently transferred from the plaintiff to the third defendant on 13 July 2015, without the plaintiff's knowledge and consent, through the acts of fraud and forgery by the third, fourth, fifth and/or sixth defendants?

(ii) whether the first and/or second defendants are liable to the plaintiff for negligence in failing to exercise reasonable care in registering the transfer of the title to the subject land from the plaintiff to the third defendant on 13 July 2015?

(iii) whether the seventh and eighth defendants are entitled to register and retain the title to the subject land in their personal names as *bona fide* subsequent purchasers of the subject land in good faith and for valuable consideration, if any?

The Law On Whether Parties Can Submit Outside The Agreed Issues To Be Tried

[50] I note that in the written submissions filed before me parties have submitted on additional issues which are not part of the three agreed issues to be tried.

[51] At the outset, I say that the general rule is that parties cannot submit outside the agreed issues to be tried. To allow such liberty is prejudicial to the opposing side as his case and evidence presented at trial would have been based on the agreed issues to be tried.

[52] A case reiterating the rule that parties are bound by their agreed issues to be tried is *Appraisal Property Management Sdn Bhd & Ors v. Singham Sulaiman Sdn Bhd* [2023] 2 CLJ 206 CA where Azizah Nawawi JCA delivering the judgment of the court when rejecting an issue raised said:

> [64] **We are of the considered opinion and we agree with the appellants that this issue was not an agreed issue for trial.** It was raised and embellished when the appellants' last witness, SD4 gave evidence under cross-examination. (emphasis added)

[53] An exception to the general principle that parties are bound by their agreed issues to be tried is when the following facts are present:

(i) the issue was pleaded in the pleadings.

(ii) the issue was raised in the course of the trial and/or in the submissions of parties; and

(iii) no objection was taken promptly to the departure from the agreed issues.

[54] A case that confirms the existence of this exception to the general principle is the Court of Appeal case of *Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors* [2015] 9 CLJ 422; [2016] 1 MLJ 507 ("*Bounty Dynamics*"), where one of the issues raised on appeal was whether the trial judge was wrong in not considering the limitation issue raised in defence just because it was not an agreed issue for trial.

[55] The Court of Appeal held that the trial judge had erred for not doing so. Umi Khaltum JCA held:

> Whether time should run from the date of the sale to Maybank Trustees for purposes of limitation
>
> [19] *The issue on limitation was not at all referred to by the learned JC in his judgment. Although limitation was not an issue expressly included in the agreed issues for trial, this same issue was pleaded in the defence of the appellant, and was raised in the course of the trial and in the submissions of both parties before the learned JC. In these circumstances, we found that this issue had become part of the issues at the trial. The framing of agreed issues during case management was meant to facilitate the trial process; agreed issues are not in the nature of pleadings.* Since both parties had departed from the agreed issues, the issue of limitation became relevant for judicial appreciation and evaluation by the learned JC. *Any objection to a departure from agreed issues should have been taken promptly at the point of time it emerged.* A similar principle was applied in the context of pleadings in *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585. In our view, the same principle should apply here. *By not addressing this important issue, we found there had been a manifest non-direction on a critical aspect of the trial by the learned*

A *JC.* If the respondents' claim was time barred under s. 6 of the Limitation Act 1953 (which was the applicable provision), the failure by the trial court to address this issue would be a glaring error of law founded on a clear misdirection, which would invite appellate intervention. (emphasis added)

[56] *Bounty Dynamics* was followed by the High Court case of *Mok Sai How*
B *v. Dakang Bikasan* [2019] 1 LNS 2295; [2020] 9 MLJ 80 at [22 to 23] Celestina Stuel Galid J.

Additional Issues Raised By The Plaintiff And The Seventh To Ninth Defendants Which Are Not Part Of The Three Agreed Issues To Be Tried

C *Additional Issue Raised By The Plaintiff*

[57] In both the written submissions and in oral submissions, the plaintiff had raised the additional issue that the seventh and eighth defendants were immediate purchasers and not subsequent purchasers under the proviso to s. 340(3) of the NLC as they had acquired their title not from an immediate
D purchaser but from imposters of those entitled to the land. The plaintiff relies on *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, FC Held 1, Jeffrey Tan FCJ.

[58] I will allow this additional issue to be ventilated by the plaintiff as it satisfied the test set out by the Court of Appeal in *Bounty Dynamics* referred
E to above. This issue had also been pleaded in the amended statement of claim at paras. 56 and 57.

Additional Issues Raised By The Seventh To Ninth Defendants

Issue That The Plaintiff Has Absolutely Assigned Her Right Over The
F Subject Land To Her Daughter As A Donee Under A Power Of Attorney

[59] In their written submissions, the seventh to ninth defendants had also raised the additional issue that the plaintiff has absolutely assigned her right over the subject land to her daughter as a donee under a power of attorney and hence has no *locus standi* to file this suit after the creation of the said
G power of attorney. The power of attorney can be seen in B1 at pp. 21 to 24.

[60] I will allow this additional issue to be ventilated by the seventh to ninth defendants although not pleaded in their defence as the creation of the power of attorney was brought up by the plaintiff herself in her witness statement at Q and A 11.

H

Additional Issue Raised By D7 To D9 That The Stamp "DIBATALKAN" On The Genuine IDT Produced By The Plaintiff Means That The Plaintiff Is Not The Owner Of The Subject Land

[61] In their written submissions, the seventh to ninth defendants had also
I raised the additional issue that the stamp "DIBATALKAN" on the genuine IDT produced by the plaintiff means that the plaintiff is not the owner of the subject land. (See D7 to D9 written submissions at paras. 18.3 to 18.9).

[62] I will not allow this point to be raised as it is not pleaded in the defence. In any event, there are no merits in this submission. I agree with the plaintiff on this point. (See plaintiff's reply submissions to D7 to D9 written submissions at paras. 21 to 23). The stamp "DIBATALKAN was on the "express conditions" imposed on the subject land. It means the "express conditions" imposed on the subject land are cancelled. It does not mean the plaintiff is not the owner of the subject land.

[63] Further, if the genuine IDT produced by the plaintiff had indeed been cancelled by the land office, as alleged by the seventh to ninth defendants, the genuine IDT would have been cancelled and destroyed by the Registrar, as required under para. 8(9) [d] of the 14th Schedule of the NLC, and not merely stamped "DIBATALKAN" on the "express conditions" imposed on the subject land and then returned to the plaintiff.

Additional Issue Raised By D7 To D9 That There Is Uncertainty As To Whether The Plaintiff Did Or Did Not Purchase The Subject Land By Taking A Loan

[64] In their written submissions, the seventh to ninth defendants had also raised the additional issue that the plaintiff had taken a loan from the Government but such loan was not registered in the title for charge. Thus, they contend that there is uncertainty as to whether the plaintiff did or did not purchase the subject land by taking a loan.

[65] I will not allow this point to be raised as its not pleaded in the defence. In any event, there are no merits in this submission. Whether the plaintiff had or had not taken a loan from the Government has nothing to do with the cause of action relied on by the plaintiff against D7 to D9.

Additional Issues Allowed By Me To Be Ventilated

[66] I will now consider the additional issues allowed by me to be ventilated before I consider the three agreed issues to be tried.

The Plaintiff's Additional Issue That The Seventh And Eighth Defendants Were Immediate Purchasers And Not Subsequent Purchasers Under The Proviso To s. 340(3) Of The NLC

[67] The plaintiff had raised the additional issue that the seventh and eighth defendants were immediate purchasers and not subsequent purchasers under the proviso to s. 340(3) of the NLC as they had acquired their title not from an immediate purchaser but from imposters of those entitled to the land. The plaintiff relies on *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, FC Held 1, Jeffrey Tan FCJ.

[68] For convenience, I will consider this issue later together with the agreed issue (c) which is the defence of *bona fide* purchaser in good faith and for valuable consideration as they are inter-related.

The Seventh To Ninth Defendants' Additional Issue That The Plaintiff Has Absolutely Assigned Her Right Over The Subject Land To Her Daughter As A Donee Under A Power Of Attorney And Hence Has No Locus Standi To File This Suit

[69] The seventh to ninth defendants contend that the plaintiff has absolutely assigned her right over the subject land to her daughter as a donee under a power of attorney and hence has no *locus standi* to file this suit. As evidence, they refer to the power of attorney that can be seen in B1 at pp. 21 to 24.

[70] I do not accept the contention. The preamble to the power of attorney that can be seen in B1 at pp. 21 to 24 clearly states that the plaintiff is desirous of recovering the subject land with the assistance of her daughter as her attorney. Nowhere do the terms of the power of attorney say that the plaintiff has absolutely assigned her right over the subject land to her daughter.

[71] Under Malaysian law a landowner does not lose the right to his or her land merely by virtue of creating a power of attorney in favour of a donee or attorney. The donee of the power of attorney is merely to act as agent for the principal and there is nothing to prevent the principal dealing with the property notwithstanding it.

[72] This legal proposition is clearly set out in *Wee Tiang Peck v. Teoh Poh Tin* [1994] 1 LNS 154; [1995] 1 MLJ 446 at Held 4 Idris Yusoff J, *Tai Swee Kian v. Tay Boo Thiah & Ors* [2011] 1 LNS 1422 Nallini Pathmanathan J and *Muniandy Nadasan & Ors v. Dato' Prem Krishna Sahgal & Ors (Dato' Jeyaraj V Ratnaswamy, Intervener)* [2017] MLJU 2047 at [25] to [27] Khadijah Idris JC.

[73] In *Tai Swee Kian v. Tay Boo Thiah & Ors* [2011] 1 LNS 1422 Nallini Pathmanathan J said:

> ... It follows from the foregoing that the relationship between the Plaintiff and D1 is that of agent and principal. The PA in the instant case does not provide that D1, the donor, shall have no power to carry out any of the acts specified in the PA on her own. More specifically, I agree with learned counsel for D2 that the PA does not state that only the Plaintiff, as donee has the sole authority to deal with the subject shares to the exclusion of D1. Applying general principles, the delegation of a power of sale does not preclude or prohibit the principal from exercising the power of sale, unless the PA expressly provides that the donor has divested completely all rights of sale to the donee.
>
> I am fortified in so concluding by the case of *In re Craven's Estate, Lloyd's Bank v. Cockburn (No. 1)* [1937] 1 Ch 423:
>
> > *... The position of the donee of the power of attorney is merely to act as agent for the principal and there is nothing to prevent the principal dealing with the property notwithstanding it, and in my judgment, the mere giving of the power of attorney to the donee is not such a parting with dominion* as is

> required to constitute a valid donation mortis causa. If, therefore, the validity of this donation rested solely on the power of attorney I should have come to the conclusion that it was not valid ...

And further on:

> ... So far as the power of attorney alone is concerned I think that there is no real difference between the law of Monaco and the law of this country. In both cases *the donee of the power is a mere agent and there is no question of the donor of the power parting with dominion to the agent at all although the agent is clothed with the authority to deal with the property so far as the power permits, in the same way as the principal could have dealt with it ...*
>
> (emphasis added)

[74] *Tai Swee Kian v. Tay Boo Thiah & Ors* [2011] 1 LNS 1422 was followed in *Muniandy Nadasan & Ors v. Dato' Prem Krishna Sahgal & Ors (Dato' Jeyaraj V Ratnaswamy, Intervener)* [2017] MLJU 2047 by Khadijah Idris JC who held:

> [25] The Power of Attorney does not provide that the 1st Defendant shall not have the power to carry out any of the acts specified in the Power of Attorney. Importantly there is no provision in the Power of Attorney which state that only the 1st Proposed Intervener has the sole authority to deal with the Property. This was the same finding made by the learned High Court Judge in *Tai Swee Kian v. Tay Boo Thiah @ Tai Boo Ting & Or*s [2011] 1 LNS 1422 where Nallini Pathmanathan J …
>
> [26] Based on the provisions of the Power of Attorney and the authorities cited, the 1st Defendant being the donor of the power did not part with dominion to the 1st Proposed Intervener at all. This is consistent with the legal principles relating to principal and agent relationship as the 1st Proposed Intervener is merely an agent of the 1st Defendant appointed to do those acts stated in the Power of Attorney in connection with the Property for and in the name of the 1st Defendant.
>
> [27] In *Wee Tiang Peck v. Teoh Poh Tin* [1995] 1 MLJ 446 the court held the effect of creating a power of attorney under of s. 5 of the PAA is that *the vesting of the property in the respondent pursuant to the irrevocable power of attorney did not signify that the applicant had divested himself of the title to his property and transferred the same to the respondent.* If the donee is authorised to sue on the donor's behalf, the action should be brought in the donor's name (*Wee Tiang Peck* (*supra*)). *Importantly the conferment of those powers to the attorney/1st Proposed Intervener does not deprive the 1st Defendant from carrying out the power himself.* (emphasis added)

[75] Therefore, I hold that the plaintiff has *locus standi* (from Latin meaning a "place to stand") and is competent to file this suit to recover her land.

The Three Agreed Issues To Be Tried

[76] I will now proceed to consider the three agreed issues to be tried.

Agreed Issue (a)

Whether The Title To The Subject Land Was Fraudulently Transferred From The Plaintiff To The Third Defendant On 13 July 2015, Without The Plaintiff's Knowledge And Consent, Through The Acts Of Fraud And Forgery By The Third, Fourth, Fifth And/Or Sixth Defendants?

The Plaintiff's Contentions

[77] The plaintiff asserts that no evidence has been adduced by any of the defendants to contradict the evidence produced by the plaintiff that the title to the subject land was fraudulently transferred from the plaintiff to the third defendant on 13 July 2015, without the plaintiff's knowledge and consent, through the acts of fraud and forgery by the third, fourth, fifth and/or sixth defendants.

The Defendants' Contentions

[78] The first and second defendants did not file any written submissions to oppose the plaintiff's contention on this issue. The seventh, eighth and ninth defendants also did not file any written submissions to oppose the plaintiff's contention on this issue.

Findings Of The Court

[79] The plaintiff in her witness statement asserted that she did not execute the Form 14A for the fraudulent transfer. (See WSPW3 Q and A 10). The plaintiff also testified that she did not sign the application to change the name registered on the title to the subject land and the related statutory declaration in support of the said application. (See WSPW3 Q and A10).

[80] The plaintiff's handwriting expert (PW1) also testified in his conclusion "that there is a very high probability that the writer of the specimen signatures, the plaintiff (Madam Chiew Yit Kin), is not the author of the disputed signatures". (See WSPW1 Q and A4 and encl. 55/P1 pp. 37 to 39).

[81] PW1's testimony and conclusion were not challenged by counsel for the first and second defendants during cross-examination. (See notes of proceedings p. 16 lines 8 to 22).

[82] The seventh to ninth defendants informed this court they don't have cross-questions on PW1's testimony and conclusion. (See notes of proceedings p. 19 line 15).

[83] The first, second, seventh, eighth and ninth defendants also did not file any written submissions to oppose the plaintiff's contention on this issue.

[84] The failure to rebut the submissions of the plaintiff gives rise to the irresistible conclusion that they do not contest the fact that the title to the subject land was fraudulently transferred from the plaintiff to the third

defendant on 13 July 2015, without the plaintiff's knowledge and consent, through the acts of fraud and forgery by the third, fourth, fifth and/or sixth defendants.

[85] The third to sixth defendants further did not enter appearances. The plaintiff has obtained judgments in default of defence against them on 19 September 2022. See encl. 54.

[86] The Federal Court in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768 FC in a land fraud case has held that when a defendant fails to defend the claim of fraud, it should be assumed that the plaintiff had made out fraud against the said defendant. This is what Jeffrey Tan FCJ (delivering judgment of the court) said:

> [9] By that, the trial court clearly held that fraud had been made out against the first to fourth respondents and so needed not to be proved. **Indeed, when the first to fourth respondents failed to defend the claim, it should be assumed that the appellants had made out fraud against the first to fourth respondents.** It would be against all good sense and logic, quixotic in fact, to hold that an allegation, although unanswered, must yet be proved. In *Datuk Patinggi Abdul Rahman Ya'kub v Abang Mohammad bin Abang Anding* [1979] 2 MLJ 185, where the plaintiff, who had obtained interlocutory judgment in default, applied for assessment of damages, Seah J, as he then was, duly assumed that all allegations in the statement of claim were deemed as proved:
>
> > In assessing damages in this case, the court is placed in a predicament in that no evidence was given either by the plaintiff or the defendant. It follows that damages should therefore be assessed on the basis of the pleadings contained in the statement of claim. For the purpose of assessing damages in this case I would assume that all the allegations in the statement of claim are deemed to have been proved.
>
> [10] When an allegation is unanswered, it must be assumed as proved, even if the party only swears to the best of his knowledge and belief (see *Williamson v. Ah On* [1926] 39 CLR 95 HC, where the High Court of *Australia cited Stokes v. Grissell* 14 CB, at pp. 689-690, where Williams J, said of chambers applications 'Where the party swears to the best of his knowledge and belief as to a matter upon which from its nature he cannot swear positively if the affidavit is unanswered by the other side, I assume the fact to be proved'). (emphasis added)

[87] I therefore answer agreed issue (a) as follows – the title to the subject land was fraudulently transferred from the plaintiff to the third defendant on 13 July 2015, without the plaintiff's knowledge and consent, through the acts of fraud and forgery by the third, fourth, fifth and/or sixth defendants.

A *Agreed Issue (b)*

Whether The First And/Or Second Defendants Are Liable To The Plaintiff For Negligence In Failing To Exercise Reasonable Care In Registering The Transfer Of The Title To The Subject Land From The Plaintiff To The Third Defendant On 13 July 2015?

B

The Plaintiff's Contentions

[88] The plaintiff contends the first and second defendants owed a duty of care to the plaintiff and were negligent in allowing three transactions on the subject land:

C

(i) allowing a change of name of the registered owner of the subject land from Chin Yu Tow nee Chiew Yit Kin to Chiew Yit Kin/the plaintiff (See B4 at pp. 21 to 22) without the submission of the genuine IDT. (See plaintiff's written submission encl. 82 paras. 120 to 122).

D (ii) failing to notify the plaintiff by way of Form 19A as required under s. 324(3) NLC when the third defendant lodged a caveat (See B1 p. 10) on the subject land. (See plaintiff's written submission encl. 82 para. 140).

(iii) allowing the fraudulent transfer when the presentation was not E accompanied by the genuine IDT. (See plaintiff's written submission encl. 82 paras. 143 to 149).

The First And Second Defendants' Contentions

[89] The first and second defendants deny that they were negligent.

F Analysis Of The Court

[90] The plaintiff contends that the first defendant had not complied with para. 8(9) of the Fourteenth Schedule of the NLC.

[91] The NLC is the applicable statute as the NLC (Revised 2020) (Act G 828) which replaces it only came into force on 15 October 2020. The events in our case happened in 2015.

[92] The Fourteenth Schedule of the NLC came into force at different dates based on the locations of the Land Registration Offices. In the Federal Territory of Kuala Lumpur, it came into force on 1 April 1995. (See H Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 1/2012 Computerised Land Registration System dated 12 January 2012).

[93] Paragraph 8(9) of the Fourteenth Schedule of the NLC provides a mandatory duty on the Registrar upon conversion of an existing IDT to a computerised IDT not to release the computerised IDT unless the existing I IDT is produced to him. When produced to him the Registrar will then cancel and destroy the existing IDT. Any breach of para. 8(9) of the Fourteenth Schedule of the NLC by the Registrar is a breach of his statutory duty as well as a breach of his duty of care to the landowner.

See:

(i) *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153; [2013] 7 MLJ 755 HC Harmindar Singh J at (21 to 22 and 32 to 34).

(ii) *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441; [2019] 2 MLJ 553 at [128] FC Azahar Mohamed FCJ; and

(iii) *Pendaftar Hakmilik Negeri Selangor v. Caesius Development Sdn Bhd & Ors And Another Appeal* [2020] 3 CLJ 327 at (pp. 6, 41 and 42) Zaleha Yusof JCA).

[94] The law is clear that there will be a breach of para. 8(9) of the Fourteenth Schedule of the NLC by the Registrar if he issues the computerised IDT to a third party while the existing IDT for the said land is still in the possession of the landowner. This breach is a breach of his statutory duty under the NLC as well as a breach of his duty of care to the landowner.

(See *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153; [2013] 7 MLJ 755 at [21 to 22 and 32 to 34) HC Harmindar Singh J and *Pendaftar Hakmilik Negeri Selangor v. Caesius Development Sdn Bhd & Ors And Another Appeal* [2020] 3 CLJ 327 at [6, 41 and 42] Zaleha Yusof JCA).

[95] In *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153; [2013] 7 MLJ 755 HC Harmindar Singh J helpfully explained the computerising of the IDT as follows:

> [21] It should be observed at the outset that prior to computerisation, there were always two copies of the manual IDT, one kept by D8-D12 and the other by the proprietor. *Under the scheme of conversion set out in Section 8 of the 14th Schedule, the computerised IDT will have been validly issued and effective when firstly the manual IDT in the possession of D8-D12 is endorsed and cancelled, and secondly the proprietor is called upon to take delivery of the computerised IDT in exchange for the manual IDT in the possession of the proprietor, and thirdly when the manual IDT is destroyed.*
>
> [22] It is worth mentioning that *until a computerised IDT is issued to the proprietor, the previous manual IDT remains in force and is valid.* Significantly as well, the computerised IDT is not a new title, but rather a title in continuation from the previous manual IDT. And this process usually occurs when there is a dealing upon the land in question …
>
> …
>
> [32] *In the instant case, there were now two titles. Obviously, as noted earlier, the second title in the name of D1 ought not to have been issued.* This much was conceded by DW10, giving evidence for D8-D12, that the original manual IDT in the plaintiff's possession was the valid title … Learned senior federal counsel for D8-D12 candidly admitted in his submission that only the plaintiff had the valid title.

A [33] *The issuance of the second title was without doubt due to a grave failure by D8-D12 to adhere to the strict mandatory provisions set out in the 14th Schedule of the NLC. There was no notification to the plaintiff as proprietor of Lot 14942 to take delivery of the computerised IDT in exchange for the manual IDT in the plaintiff's name and in its possession. There was also no cancellation or destruction of the manual IDT in the name and possession of the plaintiff proprietor. The* B *plaintiff was never issued with the title in computerised IDT in its name as a title in continuation as was required under the 14th Schedule.*

[34] *The issuance of a computerised IDT in the name of D1, being a breach of the provisions of the 14th Schedule, of the NLC, was ultra vires and unlawful.* Clearly, the plaintiff was deprived of its land in violation of art. 13(1) of the C Federal Constitution which states: 'No person shall be deprived of property save in accordance with law' … (emphasis added)

[96] In *Pendaftar Hakmilik Negeri Selangor v. Caesius Development Sdn Bhd & Ors And Another Appeal* [2020] 3 CLJ 327 CA Zaleha Yusof JCA said in affirmative terms:

D [39] As a keeper of all land titles, for a particular State (in this case Selangor) *it is reasonable to impose upon the land office,* including the seventh defendant, *a duty of care towards all landowners, to ensure that the landowners' interests are well protected and safeguarded. The land office, including the seventh defendant, has to ensure that the law and proceedings are followed strictly, failing* E *which it can cause the landowners losing their lands.*

…

[41] Based on the decision of the High Court in *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153; [2013] 7 MLJ 755 and the case of *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* F [2012] 3 CLJ 271; [2012] 8 MLJ 713 *the learned High Court Judge found that the seventh defendant had acted in contravention of the scheme provided under s. 8 of the Fourteenth Schedule when it issued the computerised issue document of title to the third defendant while the original manual issue document of title for the said land was still in the possession of the plaintiff.* Instead of requesting the plaintiff to take delivery of the computerised issue document of title, the seventh G defendant had issued and delivered it to the third defendant who was not the then existing proprietor of the said land.

[42] *We find no reason to disturb this finding of the learned High Court Judge.* Not only had the seventh defendant been negligent in handling the change of name under s. 378 of the NLC, the scheme provided under s. 8 of the H Fourteenth Schedule had also been breached. It must be emphasised that the change of name envisaged under s. 378 is only in respect of the name of the proprietor and NOT on the ownership of the land. The ownership of the land remains unchanged. However, the evidence showed that after the change of name was registered, the computerised issue document of title was issued by the seventh defendant in the name of the third I defendant as the registered proprietor of the said land. There was no reasonable explanation given by the seventh defendant as to why he allowed these utterly questionable transactions to take place. *Paragraph (c) of sub-s. 8(9) of the Fourteenth Schedule clearly states that where conversion is effected*

by the Registrar on his own accord, he shall not be obliged to deliver to the proprietor the computer printed issue document of title unless the existing issue document of title is produced to him. It is not disputed that the existing issue document of title has always been and is still with the plaintiff.

[43] *Therefore, the act of the seventh defendant in delivering the new computerised issue document of title to the third defendant was clearly in breach of paragraph 8(9)(c) of the Fourteenth Schedule of the NLC. See the recent decision of the Federal Court in Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441.* (emphasis added)

[97] The first defendant called as its sole witness Encik Khairul Azam bin Saroni (DW4) who is a Ketua Penolong Pengarah, Bahagian Pendaftaran of the first defendant.

[98] On the facts of our case here, it is undisputed that the plaintiff still has the genuine IDT with her. (See notes of proceedings p. 260 lines 1 to 22). The first defendant's sole witness DW4 cannot explain how and why the land office had issued the computerised IDT for the subject land when the genuine IDT is still with the plaintiff. (See notes of proceedings pp. 281 to 283 and p. 289 line 12).

[99] DW4 cannot explain why the first defendant allowed a change of name of the registered owner of the subject land from Chin Yu Tow nee Chiew Yit Kin to Chiew Yit Kin/the plaintiff (See B4 at pp. 21 to 22) without the submission of the genuine IDT. (See plaintiff's written submission encl. 82 paras. 120 to 122).

[100] DW4 also cannot explain why the first defendant failed to notify the plaintiff by way of Form 19A as required under s. 324(3) NLC when the third defendant lodged a caveat (See B1 pp. 10) on the subject land. (See plaintiff's written submission encl. 82 para. 140).

[101] DW4 further cannot explain how the fraudulent transfer could have happened when the presentation was not accompanied by the genuine IDT. (See plaintiff's written submission encl. 82 paras. 143 to 149).

[102] DW4 has no actual knowledge of the transactions in question. (See notes of proceedings pp. 281 to 283 and p. 289 line 12). He candidly admitted that the officers who have actual knowledge are Encik Zaini who handled the application to change the name (See notes of proceedings p. 269 lines 9 to 12) and who is still serving at Pejabat Pusaka Kecil, Seremban (notes of proceedings p. 270 lines 2 to 6) and Puan Nor Laili binti Safiin who handled the application to lodge a caveat by the third defendant and who allowed the fraudulent transfer (notes of proceedings p. 304 line 15). (See also plaintiff's written submission encl. 82 para. 150).

A **Adverse Inference Against The First Defendant Under s. 114 Illustration (g) Evidence Act**

[103] Section 114 Illustration (g) of the Evidence Act 1950 provides as follows:

B Section 114 – Court may presume existence of certain fact

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

C ILLUSTRATIONS

The court may presume:

…

(g) That evidence which could be and is not produced would if produced D **be unfavourable to the person who withholds it;** (emphasis added)

[104] An adverse inference under s. 114 Illustration (g) Evidence Act will be drawn by this court against the first defendant for not calling Encik Zaini and Puan Nor Laili binti Safiin as witnesses. There was no reasonable explanation for the failure to produce these two material witnesses. The E adverse inference would be that if they were to testify, their evidence would affect the first defendant adversely.

(See *Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir'* [2012] 1 LNS 1116; [2012] 5 MLJ 515 at [92] HC Nallini Pathmanathan J and *Marappan* F *Muthusamy v. R Sivam Ramasamy* [2013] 1 LNS 1381; [2014] 4 MLJ 428 at [28] CA Rohana Yusuf JCA).

[105] The facts show that the plaintiff has proven her case on a balance of probability that the land office had issued the computerised IDT for the subject land when the genuine IDT is still with the plaintiff. This is a breach G of para. 8(9) of the Fourteenth Schedule of the NLC by the Registrar.

[106] Therefore, on agreed issue (b) I hold that the first defendant is liable to the plaintiff for negligence in failing to exercise reasonable care in registering the transfer of the title to the subject land from the plaintiff to the H third defendant on 13 July 2015.

[107] The second defendant in its submissions did not contend that it is not vicariously liable for the negligence of the first defendant if this court finds the first defendant negligent. Therefore, I hold that the second defendant is vicariously liable for the said negligence of the first defendant.

I

Agreed Issue (c)

Whether The Seventh And Eighth Defendants Are Entitled To Register And Retain The Title To The Subject Land In Their Personal Names As Bona Fide Subsequent Purchasers Of The Subject Land In Good Faith And For Valuable Consideration, If Any?

The Plaintiff's Contention

[108] The plaintiff contends that the seventh and eighth defendants are not *bona fide* subsequent purchasers of the subject land in good faith and for valuable consideration.

The Seventh And Eighth Defendants' Contention

[109] The seventh and eighth defendants contend that they are entitled to register and retain the title to the subject land in their personal names as *bona fide* subsequent purchasers of the subject land in good faith and for valuable consideration. They rely on the proviso to s. 340(3) of the NLC.

Analysis Of The Court

The Relevant Statute

[110] Section 340 of the NLC provides as follows:

> 340. Registration to confer indefeasible title or interest, except in certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) In any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) Where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) Where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) **Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):**
>
> (a) **It shall be liable to be set aside** in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) **Any interest subsequently granted thereout shall be liable to be set aside** in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. (emphasis added)

The Law On The Proviso To Section 340(3) Of The NLC

[111] The law on the proviso to s. 340(3) of the NLC can now be considered settled. It is definitely not *terra incognita*. (Latin for "an unexplored country or field of knowledge").

[112] I do not propose to set out at length the principles governing the proviso to s. 340(3) of the NLC. They have been discussed *in extenso* (Latin for "at full length") in the following cases:

(i) *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 CA, Raus Sharif JCA.

(ii) *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1 FC, Zaki Azmi CJ Malaysia and Arifin Zakaria CJ (Malaya).

(iii) *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768 FC, Jeffrey Tan FCJ.

(iv) *CIMB Bank Bhd v. AmBank (M) Bhd & Ors* [2017] 9 CLJ 145; [2017] 5 MLJ 142 FC, Raus Sharif CJ.

(v) *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711 FC, Azahar Mohamed FCJ.

(vi) *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441; [2019] 2 MLJ 553 FC, Richard Malanjum CJ (Sabah and Sarawak) and Azahar Mohamed FCJ.

(vii) *Yap Piat Eng & Anor v. Yap Kok Sheng & Ors* [2020] 1 LNS 618; [2020] MLJU 572 HC Darryl Goon J. Affirmed as *Wong Ing Tong v. Yap Piat Eng & Anor And Other Appeals* [2022] 4 CLJ 882; [2022] MLJU 301 CA, Hadhariah Syed Ismail JCA.

[113] The following principles can be distilled from the cases cited above:

(i) the proviso to s. 340(3) of the NLC provides for deferred indefeasibility and not immediate indefeasibility. In other words, it only gives good title to a subsequent purchaser in good faith and for valuable consideration. The first/immediate purchaser does not get good title even if he is a purchaser in good faith and for valuable consideration. (*Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1 FC, Zaki Azmi CJ Malaysia and Arifin Zakaria CJ (Malaya)).

(ii) the word 'purchaser' in the proviso to s. 340(3) of the NLC includes a chargee and anyone who has acquired title to, or any interest in land. Thus, a chargee can invoke the protection under the proviso to s. 340(3) of the NLC. (*CIMB Bank Bhd v. AmBank (M) Bhd & Or*s [2017] 9 CLJ 145; [2017] 5 MLJ 142 FC (16) to (18) Raus Sharif CJ).

(iii) the purchaser bears the evidential burden of proving that he is a purchaser in good faith and for valuable consideration. There is no duty on the plaintiff/landowner to prove that the purchaser was a party or privy to the fraud or forgery. (*Abu Bakar Ismail & Anor v. Ismail Husin & Ors And Other Appeals* [2007] 3 CLJ 97; [2007] 4 MLJ 489 at [18] CA Gopal Sri Ram JCA and *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 at [45] CA Raus Sharif JCA).

(iv) a purchaser in good faith does not include a purchaser who was careless or who had been negligent. There is no good faith if a purchaser and/or his solicitor did not do thorough checks on the sale in his haste to conclude a sale price below the market price (*Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 CA Raus Sharif JCA).

(v) knowledge of the allegation of fraud on the part of the purchaser's solicitor or lack of good faith on the part of the solicitor can be imputed to the purchaser. The purchaser is bound by the knowledge of his solicitor and will lose the protection of the proviso to s. 340(3) of the NLC if his solicitor did not act in good faith. (*T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711 FC at (88) to (91), Azahar Mohamed FCJ).

(vi) a purchaser is not in law considered a subsequent purchaser under the proviso to s. 340(3) of the NLC if he has acquired his title not from an immediate purchaser but from imposters of those entitled to the land. This purchaser is in law considered an immediate/first purchaser (*Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, FC Held 1, Jeffrey Tan FCJ).

Application Of The Law To Facts

Contentions Of The Plaintiff That The Seventh And Eighth Defendants Cannot Rely On The Proviso To s. 340(3) Of The NLC

[114] In this trial the plaintiff contends that:

(a) the seventh and eighth defendants were immediate purchasers and not subsequent purchasers under the proviso to s. 340(3) of the NLC as they had acquired their title not from an immediate purchaser but from imposters of those entitled to the land. The plaintiff relies on *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, FC Held 1, Jeffrey Tan FCJ.

A (b) alternatively, the seventh and eighth defendants did not act 'in good faith' as required by the proviso to s. 340(3) NLC.

(c) further, the seventh and eighth defendants did not provide valuable consideration for their purchase.

B Contention (a)

Are The Seventh And Eighth Defendants Immediate Purchasers And Not Subsequent Purchasers?

[115] The Federal Court has now clarified that a purchaser is not in law considered a subsequent purchaser under the proviso to s. 340(3) of the NLC C if he has acquired his title not from an immediate purchaser but from imposters of those entitled to the land. (*Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, FC Held 1, Jeffrey Tan FCJ).

D **[116]** Similarly, in this case the seventh and eighth defendants did not acquire the subject land from a purchaser who bought from a fraudster seller. Instead, the seventh and eighth defendants bought the subject land from the third defendant who had obtained title fraudulently by executing a fraudulent Form 14A which contains the plaintiff's forged signature.

E **[117]** Therefore, based on *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768 FC, the seventh and eighth defendants are immediate purchasers and not subsequent purchasers. They are therefore not entitled to indefeasibility of title as against the plaintiff under the proviso to s. 340(3) of the NLC.

F **[118]** On this ground alone, the plaintiff is entitled to judgment against the seventh and eighth defendants.

Contention (b)

Did The Seventh And Eighth Defendants 'Act In Good Faith' As Required G **By The Proviso To s. 340(3) NLC**

The Law On The Meaning And Scope Of 'Good Faith' In The Proviso To s. 340[3] NLC

[119] The issue before this court is whether the seventh and eighth H defendants are purchasers in good faith such that their title prevails over the plaintiff.

[120] The scope and ambit of 'good faith' has been explained in the leading Federal Court case of *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711 Azahar Mohamed FCJ; and the Court of Appeal I decision in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 CA Raus Sharif JCA.

[121] In *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711) Azahar Mohamed FCJ in delivering the judgment of the Federal Court analysed *in extenso* the scope and ambit of 'good faith':

Good Faith

[44] The rival contentions of the parties first bring into sharp focus the meaning of *'good faith'* within the context of the proviso to s. 340(3) of the NLC. As we have seen earlier, the meaning of 'good faith' is a matter of importance in this case. What does the term mean? *'Good faith'* is a weighty phrase. It *implies,* according to *Concise Oxford English Dictionary* (11th Ed) *honesty or sincerity of intention.* According to the authors of *NS Bindra's Interpretation of Statutes* (10th Ed) p. 1636, *'good faith' includes due inquiry and implies not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable person.* According to the authors, *'good faith' contemplates an honest effort to ascertain the facts upon which exercise of the power must rest; it must, therefore, be summed up as 'an honest determination from ascertained facts'. The authors stated that 'good faith' precludes pretence or deceit, and also negligence and recklessness. The authors further said although the phrase may vary in the context of different statutes, subjects and situations, honest intent free from taint or fraud, or fraudulent design, is a constant element of its connotation.*

…

[46] In our opinion, *the existence of good faith or otherwise would depend on the particular facts of each case; it is a question of fact in each case for the court to determine on the evidence.* The overriding consideration is 'the particular circumstances of each case' (see *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 MLJ 465 and *State Tailor Sdn Bhd v. Nallapan* [2005] 2 MLJ 589).

…

[49] The second case is *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 5 MLJ 136 where in *holding that a purchaser in good faith did not include a purchaser who was careless or who had been negligent,* Raus Sharif JCA (as His Lordship then was) in discussing the element of good faith explained:

> Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that *the first defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In Oliver v. Hinton* [1899] Ch D 264 Lindley MR said:

> To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgagee of her priority would be the greatest injustice.
>
> So too here. *The first defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions, which ought to be taken in such a matter he is not entitled to the protection of the court.*
>
> [50] The principle underlying the above cases is that the law recognises and enforces an overriding rule that in making and carrying out conveyancing transaction that commonly deals with a number of transactions and dealings to transfer real property, parties should act in good faith. *Good faith, therefore, does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonably or fairly (see Stuart v. Kingston [1923] HCA 17; [1923] 32 CLR 309 and Pekan Nenas Industries Sdn Bhd). The elements of good faith are not closed; it must in all cases depend upon the circumstances. It is not enough for a purchaser to merely show absence of fraud, deceit or dishonesty; knowledge of a dispute as to the ownership of property and knowledge of fraud allegation, for example, could vitiate good faith.*
>
> (emphasis added)

[122] Last year, *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711 and the Court of Appeal decision in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 CA were followed by the Court of Appeal in *Wong Ing Tong v. Yap Piat Eng & Anor And Other Appeals* [2022] 4 CLJ 882; [2022] MLJU 301 which held:

> [54] The word "good faith" has no exhaustive meaning. Generally, good faith is understood to mean honesty or sincerity of intention. The common features to look for in determining a purchaser of good faith are as follows:
>
> (i) Good faith does not simply mean absence of fraud, deceit or dishonesty. It also requires acting honestly, reasonably and fairly; (*T Sivam a/l Tharmalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v. Public Bank Bhd* [2018] 5 MLJ 711).
>
> (ii) Knowledge of a dispute as to the ownership of property and knowledge of fraud allegation vitiate good faith; (*T Sivam*'s case).
>
> (iii) Elements of carelessness and negligence negate good faith; (*Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 5 MLJ 136.

Facts Showing The Seventh And Eighth Defendants Did Not Act 'In Good Faith' As Required By The Proviso To s. 340(3) NLC

[123] I agree with the submissions of the plaintiff that the seventh and eighth defendants have failed to discharge the evidential burden on them to show they had acted 'in good faith'. My reasons are set out below.

Assertion By D7 And D8 That The Purchase Of The Subject Land Was Made In Good Faith Based On The Result Of A Private Land Search Conducted On 19 August 2015 (Before Entering Into The SPA)

[124] D7 and D8 pleaded in their defence that "… the purchase of the said land … was made in good faith without any suspicion or doubt and based on the result of the private land search conducted on the said land." (See bundle A at p. 72 para. 33).

[125] D7 also testified that "... I have instructed my solicitors Messrs Siga & Associates to conduct a private search on the said land and the result of the private search conducted on 19 August 2015 (before entering into the SPA) confirms that the third defendant is the registered owner …" (See WS DW3 at Q and A 12).

[126] D7 and D8 never produced in court the private land search purportedly conducted on the subject land on 19 August 2015 before entering into the SPA dated 1 September 2015. Their witness statements merely made the averment without producing the private land search.

[127] Their solicitors Sigathambal a/p Periathamby (DW1) who was the seventh and eighth defendants' solicitor who handled the sale and purchase agreement dated 1 September 2015 between the third defendant and the seventh and eighth defendants also did not produce the purported land search document.

[128] The evidential burden lies on D7 and D8 to prove they had purchased in good faith. (See *Abu Bakar Ismail & Anor v. Ismail Husin & Ors And Other Appeals* [2007] 3 CLJ 97; [2007] 4 MLJ 489 at [18] CA Gopal Sri Ram JCA and *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 at [45] CA Raus Sharif JCA).

[129] In my view D7 and D8 have not proven their assertion that the purchase of the subject land was made in good faith based on the result of a private land search conducted on 19 August 2015 (before entering into the SPA on 1 September 2015).

D7 And D8 Purportedly Paid Upfront A Total Sum Of RM2 Million In Cash Before Signing The SPA Dated 1 September 2015

[130] According to D7 and D8's solicitor Sigathambal a/p Periathamby (DW1), D7 informed her that they had already paid upfront a total sum of RM2 million in cash before he engaged her to prepare the SPA. Since the purported purchase price was RM 4.5 million, this constitutes 44.4 % of the purported purchase price. (See notes of proceedings p. 85 line 15, p. 86 line 10 to 12 and p. 94 lines 18 to 21).

[131] The normal earnest deposit paid by a prudent buyer is 2% to 3% of the purchase price. This is admitted by DW1. (See notes of proceedings p. 92 lines 12 and 18). To pay 44.4 % of the purported purchase price, which is a large sum of RM2 million and also in cash, even before D7 and D8 engaged DW1 to prepare the SPA is highly unusual to say the least. What is even more unusual is that RM2 million in cash is paid even before the seller/D3 agrees to the terms of the SPA and signs the SPA signifying D3 is bound by the terms therein!

[132] In the circumstances, the purported 44.4 % of the purported purchase price paid by D7 and D8 before the seller/D3 agrees to the terms of the SPA and signs the SPA shows that they had failed to discharge their evidential burden to prove their assertion that the purchase of the subject land was made in good faith.

[133] As stated by the Federal Court in *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711), "Good faith, therefore, does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonably or fairly."

The Sale Price Was Grossly Below Market Price

[134] The Lembaga Hasil Dalam Negeri Malaysia valued the market value of the subject land at RM5,269,000. (See B1 at p. 95). This valuation is not disputed by D7 and D8.

[135] D7 and D8 purchased the subject land purportedly for only RM4.5 million. That means the discount was RM769,000. This is not a small sum.

[136] On the 'good faith' evidential burden on D7 and D8 when they purchased the subject land at a grossly below market price, I need only refer to *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 CA, where Raus Sharif JCA said:

> [42] Had the learned trial judge taken the above facts and circumstances into consideration, he cannot possibly conclude that the first defendant was a *bona fide* purchaser for valuable consideration, so as to be protected under s. 340(3) of the Code. To me, the first defendant had acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. *No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the plaintiffs*. This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the plaintiffs. In such circumstances the court must not favour the first defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs.

[43] Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, *a reasonable inference would be that the first defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In Oliver v. Hinton [1899] Chancery Division 264 Lindley MR said: To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgage of her priority would be the greatest injustice.*

[44] So too here. The first defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions, which ought to be taken in such a matter he is not entitled to the protection of the court.

[45] Another error on the part of the learned trial judge is this. While he acknowledged the fact that the consideration paid by the first defendant was below the government valuation and the plaintiffs' valuer but concluded that 'that by itself cannot negative the first defendant's status as *bona fide* purchase for valuable consideration bearing in mind that the plaintiffs have failed to adduce evidence of the first defendant to the fraud or forgery'. *Clearly, the learned trial judge had misdirected himself on the law. To me, since the first defendant was relying on the proviso of s. 340(3) of the Code, that he was a bona fide purchaser for valuable consideration, the evidential burden falls on him. The evidential burden remained with the first defendant. There is no duty on the plaintiffs to prove that the first defendant was a party or privy to the fraud or forgery.* (emphasis added)

[137] D7 testified that he took the risk to pay RM2 million in cash even before signing the SPA and even before searches were done and that if anything goes wrong he will accept the responsibility. This is what D7/BG said in court:

(Notes of Proceedings page 237)

RY Now, would you also agree with me that the circumstances surrounding this purchase (seller is RM2 million, payment in cash on Deposit, *you admitted that the purchase price was below market value, would put you to enquiry isn't it?* It maybe something risky with this deal, I will make further enquiry, you don't think it's risky?

BG Basically in business, I think I know what I did. And I do not find it risky because I look at the place, I dealt with the person, I am sure about what I was doing. *If anything goes wrong, I buy to it and that is about it. That's the way I do my business.*

(Notes of Proceedings page 239)

RL Dr. Baskaran, earlier my learned friend suggested to you that paying RM2million even before signing the SPA, it is … isn't it something wrong? And then, you said nothing odd. You wanted to explain it, right? Can you explain as to why you said it is not odd paying before signing the SPA?

BG So, this was the agreement which I had with the agent based on what the vendor had requested. *And when they agree to the price at RM4.5 million, I said okay, fine, I agree to making this payment while waiting for the search to be done my lawyer and at the same time to get the agreement done.* And having dealt with the particular person, he assured me everything is in order, it is owned by Opulence and it is free from encumbrances and I proceed to do that. Beyond that *if anything is affected or becomes wrong basically it is my responsibility.* That's why I said I did not find anything odd. (emphasis added)

[138] It is my respectful view that D7 took exactly the type of risk that Raus Sharif JCA warned about in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 CA:

> [42] … *No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the plaintiffs.* This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the plaintiffs. In such circumstances the court must not favour the first defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs. (emphasis added)

[139] Therefore, D7 and D8 cannot now invoke the protection of *bona fide* buyer 'in good faith' as required by the proviso to s. 340(3) NLC.

The Assessment Notices Do Not Show D3 Is The Owner Of The Subject Land

[140] The tax assessment bills dated 1 January 2013 and 29 December 2015 (B1 pp. 62 to 63), the notices to pay arrear of rates issued by DBKL dated 30 September 2015, 23 March 2016, 1 September 2016 and 1 March 2022 (B1 pp. 58 to 61) and the assessment rates notices issued by DBKL dated 13 December 2018, 23 December 2019, 1 July 2020, 1 July 2021 and 1 January 2022 (B1 pp. 13 to 17) all show the subject land owner is Chin Yu Tow who is the late husband of the plaintiff.

[141] DW1 who is the solicitor for D7 and D8 would have seen these bills and notices as part of her due diligence checks before she did the transfer of the subject land from D3 to D7 and D8. She would have seen the owner stated on all these bills and notices is not D3. This is a big red flag. Her knowledge is deemed in law to be the knowledge of D7 and D8. (See *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711 FC).

[142] In *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711 FC Azahar FCJ said:

> [88] Thus in the present case, *the knowledge of the solicitor is regarded and treated by the law as the knowledge of the defendant. The defendant was therefore infected with the knowledge that there was a serious dispute as to the ownership of the land.* What is more, the defendant knew of the allegation that Nagarajan obtained title to the land by fraud. This type of knowledge would affect the good faith of the defendant. In our opinion the status of holder of interest in good faith is lost by reason of the material knowledge. (emphasis added)

[143] Even if DW1 who is the solicitor for D7 and D8 did not see these bills and notices assuming that she didn't do her due diligence checks, when she did the transfer of the subject land from D3 to D7 and D8, her failure to do such checks amount to a lack of good faith as required under the proviso to s. 340(3) of the NLC.

[144] DW1's failure is imputed to D7 and D8. Therefore, D7 and D8 have failed in their evidential burden to prove they had purchased in good faith as required under the proviso to s. 340(3) of the NLC.

Did D7 Pay RM2 Million In Cash To D3 Through His Real Estate Agent Pathisaran a/l Anthonysamy Also Known As Steven

[145] D7 alleges that he himself paid RM2 million in cash to D3 through his real estate agent Pathisaran a/l Anthonysamy also known as Steven. The payments were in five instalments of RM50,000, RM500,000, RM500,000, RM500,000 and RM450,000. D7 alleges he received a receipt for each of the five payments from D6's law firm. (See WS DW3 Q and A14).

[146] As proof, D7 refers to the five cash/payment vouchers allegedly issued using cash/payment vouchers of D9 for convenience, allegedly signed as recipient by Pathisaran a/l Anthonysamy and the five letters from D6 purportedly acknowledging receipt of the five cash payments. (See B1 pp. 100 to 109).

[147] D7 in his testimony (notes of proceedings p. 212 lines 5 to 18) explained why he paid the cash of RM2 million but using cash/payment vouchers of D9 as evidence:

> Accordingly, when he came by for the funds, we disbursed it. We make use of Bright Way Holdings vouchers. The vouchers are neither serialised, just to acknowledge receipt of the funds. But I had made it very clear that it has to be handed over to the lawyers and they must give us the acknowledgment. As soon as we get the fund to him, quickly acknowledge on the Bright Way Holdings' voucher which is more of a basically acceptance of the money. It is made of personal basis. But Bright Way Holdings just because we use the vouchers, if that is going to be an issue, we also have a lot of dividends to verify that Bright Way Holdings

is still in the company. Anyway, we have used the funds, and Bright Way is solely owned by me, myself and my wife, we have funds, we can always replace or but then we have the dividends to be paid.

[148] The testimony of D7 that the cash of RM2 million came from him is not supported by any documentary evidence. Surely it would be easy to state on the payment vouchers that the cash of RM2 million comes from D7? After all, a sum of RM2 million in cash is no small sum. Why use five cash/payment vouchers of D9 if D9 is not the buyer? Is there a need to hide the involvement of D7 and D8? The three authorisation boxes on all five vouchers were also left blank.

[149] D7's testimony that the cash of RM2 million came from him is also contradicted by his wife D8. Under cross-examination D8 kept changing her story on the source of this RM2 million:

(i) first, she said it is D7's money. (Notes of proceedings p. 108 line 18).

(ii) then she said it is a mixture of funds of D7 and D9. (Notes of proceedings p. 183 lines 8 to 10].

(iii) then she said the RM 2 million actually belongs to her and D7. (Notes of proceedings p. 203 lines 3 to 8).

[150] The five cash/payment vouchers also showed contradictory facts. The payments were stated at line one as "In favour of Pathisaran a/l Anthonysamy". But the payments were stated at line 4 as "Part deposit payable for Hasra Hamid & Associates on account of Damansara Property".

[151] The five letters from D6 purportedly acknowledging receipt of the five cash payments also showed contradictory facts. They stated the payments as first, second, third and fourth partial balance purchase price. (See B1 pp. 100 to 109).

[152] Pathisaran a/l Anthonysamy was not called as a witness. Neither was D6 called as a witness. Thus, there are no witnesses who can testify as to the authenticity of the five cash/payment vouchers allegedly issued by D9 and the five letters from D6 purportedly acknowledging receipt of the five cash payments. (See B1 pp. 100 to 109).

[153] D6 was formerly a practicing advocate and solicitor of the High Court of Malaya under the name and style of Messrs Hasra Hamid & Associates. She was struck off the rolls of the High Court of Malaya in 2019. (See letter from Bar Council dated 14 January 2022 at B2 p. 24).

[154] Therefore, I hold that D7 has not proven he had paid RM2 million in cash to his real estate agent Pathisaran a/l Anthonysamy also known as Steven who paid D6 the solicitor who then paid her alleged client/the alleged seller D3.

Was The Balance RM2.5 Million Actually Paid To D6?

[155] D7 in his witness statement alleged that his solicitor DW1 had released the balance purchase price of RM2.5 million to D6. (See WSDW3 Q and A 14 last paragraph). This fact is contradicted by D7's own evidence produced in court. The bank's remittance form (See B1 at p. 99). Purportedly shows a direct remittance of RM2.5 million from D7 to D6 and not DW1 releasing the RM2.5 million to D6.

[156] Besides the inconsistency in the testimony of D7, D7 and D8 did not produce any written confirmation of receipt by D6 or acknowledgment by D3 to the effect that the RM2.5 million was indeed paid to D3.

Adverse Inference To Be Drawn Against D7 And D8 Under s. 114 Illustration (g) Evidence Act

[157] An adverse inference under s. 114 Illustration (g) Evidence Act will be drawn by this court against D7 and D8 for not calling their alleged real estate agent Pathisaran a/l Anthonysamy also known as Steven, and D6 as witnesses. There was no reasonable explanation for the failure to produce these two material witnesses. The adverse inference would be that if they were to testify, their evidence would affect D7 and D8 adversely.

(See *Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir'* [2012] 1 LNS 1116; [2011] 9 CLJ 426; [2012] 5 MLJ 515 at [92] HC Nallini Pathmanathan J and *Marappan Muthusamy v. R Sivam Ramasamy* [2013] 1 LNS 1381; [2014] 4 MLJ 428 at [28] CA Rohana Yusuf JCA).

[158] An adverse inference under s. 114 Illustration (g) Evidence Act will also be drawn by this court against D7 and D8 for not calling a director from D9 to support their contention that the cash of RM2 million was not from D9. This director is Ms Alice Michael who according to D7 is one of the three directors of D9. The other two directors are D7 and D8. (D7's witness statement Q and A3).

[159] Based on the totality of the evidence set out above it is my considered view that D7 and D8 had failed to discharge their evidential burden to prove they had purchased in good faith as required under the proviso to s. 340(3) of the NLC.

Contention (c)

Facts Showing The Seventh And Eighth Defendants Did Not Provide Valuable Consideration For Their Purchase

[160] Based on the evidence set out above in respect of the alleged payment of RM4.5 million it is also my considered view that D7 and D8 had failed to prove they had indeed paid RM4.5 million to D3. Thus, they failed to discharge their evidential burden to prove they had provided valuable consideration as required under the proviso to s. 340(3) of the NLC.

A **Are D7 And D8 Privy To The Fraud And Forgery Perpetrated By D3 To D6 Against The Plaintiff?**

[161] For completeness, I am of the view the plaintiff has failed to prove on a balance of probability, based on the standard of proof set out by the Federal Court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; B [2015] 5 MLJ 1 FC, that D7 and D8 are privy to the fraud and forgery perpetrated by D3 to D6 against the plaintiff.

[162] There is really no hard evidence before this court to make such inference. D7 and D8 may have taken advantage of the opportunity to buy the subject land at a low price but that does not make them privy to the fraud C and forgery perpetrated by D3 to D6 against the plaintiff.

The Plaintiff's Claim Against The Ninth Defendant

[163] The ninth defendant is a company in which the seventh defendant is a majority shareholder. (See witness statement of the seventh defendant D Q and A2). The directors of the ninth defendant are the seventh defendant, eighth defendant and Ms Alice Michael. (See witness statement of the seventh defendant Q and A3).

[164] According to the seventh defendant the ninth defendant had entered a lien-holder's caveat on the subject land on 20 May 2016 to safeguard its E interest with the intention to purchase the subject land. (See witness statement of the seventh defendant Q and A16).

[165] The ninth defendant has not shown that it is entitled to lodge a lien-holder's caveat on the subject land as against the plaintiff now that the court has ruled that the plaintiff is the rightful owner of the subject land. The F plaintiff is therefore entitled to an order to remove the ninth defendant's lien-holder's caveat on the subject land.

Decision

[166] For the reasons above, I allow prayers 58.1 to 58.6 of the amended G statement of claim (encl. 18). I also allow an order for damages to be assessed against the first and second defendants.

[167] In prayer 58.8 of the amended statement of claim the plaintiff prays for exemplary damages against the first and second defendants. I do not allow this prayer for exemplary damages against the first and second defendants as H the plaintiff's counsel had informed me at the oral submissions on 8 March 2023 that the plaintiff will drop this prayer against the first and second defendants if judgment for the return of the subject land is in the plaintiff's favour.

I

[168] In any event, I do not think it is appropriate based on the facts of this case to so order for exemplary damages against the first and second defendants. In *Yap Piat Eng & Anor v. Yap Kok Sheng & Ors* [2020] 1 LNS 618; [2020] MLJU 572 HC Darryl Goon Siew Chye J also dismissed a claim for exemplary damages in a land fraud suit.

[169] I order the first and second defendants to pay costs of RM30,000 to the plaintiff. I also order the seventh to ninth defendants to pay costs of RM50,000 to the plaintiff subject to allocator.

[170] The costs payable by the first and second defendants is not subject to fee allocator. This is because of Arahan Amalan Ketua Hakim Negara Bil 1 Tahun 2018 in relation to the filing and payment of fee allocator. Paragraph 4 says that costs that are awarded to or against the Federal Government and State Governments are not subject to fee allocator.